In the Supreme Court of the United States

OCTOBER TERM, 1941

PUGET SOUND POWER & LIGHT COMPANY, a corporation, and OLD COLONY TRUST COMPANY, a corporation, *Petitioners*,

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF WHATCOM COUNTY, a Municipal corporation, *Respondent*.

Brief of Respondent Opposing Petition for Writ of Certiorari

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SUBJECT INDEX

	PAGE
OPINION OF THE COURT BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	2
QUESTIONS PRESENTED AND ASSIGNMENTS OF ERROR	3
ARGUMENT	4
1. Public Use and Necessity	4
2. Instruction on Contractor's Profit	7
3. Striking Certain Testimony Relating to Office Building Severance Damages	11
(a) Testimony of MacFadden	12
(b) Testimony of Scudder	13
4. Admission in Evidence of District's Resolution No. 37	16
5. Divided Court and Importance of Questions	21
CONCLUSION	23

TABLE OF CASES

Alaska-Juneau Gold Mining Co. vs. Larson, 279 Fed. 420 12

Blomskog, Erickson & Cotton vs. Seattle, 107 Wash. 471, 182 Pac. 571 ..... 18, 20

Board of Directors of St. Francis Levee District vs. Webb, 188 Fed. 67 ..... 19, 20

Brooklyn Borough Gas Co. vs. Prendergast, 16 Fed. (2d) 615 8

Carstens vs. Public Utility District No. 1 of Lincoln County, 8 Wash. (2d) 136, 111 Pac. (2d) 583 ..... 4, 5

PAGE

Cary vs. Corporation Commission of Oklahoma, 17 Fed. Supp. 772 8

City of Seattle vs. Lake Union Brick Co., 166 Wash. 278, 6 Pac. (2d) 591 14

Company A, First Regiment, etc., vs. Hughes, 193 N. W. 144 13

Griffiths vs. Robinson, 181 Wash. 438, 43 Pac. (2d) 977 7

Houston Oil Co. vs. Goodrich, 245 U. S. 440, 62 Law Ed. 385 10

Ingram vs. Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34 14

In re. Seattle, 102 Wash. 286, 172 Pac. 1161 ..... 18, 20

King County vs. Joyce, 96 Wash. 520, 165 Pac. 399 14

Layne & Bowler Corp. vs. Western Well Works, 216 U. S. 387, 67 Law Ed. 712 10

McClure vs. Village of Brown's Valley, 173 N. W. 672 13

Mutual Life Ins. Company vs. Hillman, 145 U. S. 285, 36 Law Ed. 706 19

New York Life Ins. Co. vs. Melgard, 74 Fed. (2d) 489 11

N. P. Railway Co. vs. Krohne, 86 Fed. 230 11

Page vs. Arkansas Natural Gas Corporation, 286 U. S. 269, 271, 76 Law Ed. 1096, 1098 10

Port Townsend Southern R. Co. vs. Nolan, 48 Wash. 382, 93 Pac. 528 13

Puget Sound Power & Light Co. vs. City of Puyallup, 51 Fed. (2d) 688 ..... 14, 17

Ruhlin vs. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290 9

PAGE

Seattle & M. Ry. Co. vs. Gilchrist, 4 Wash. 509, 30 Pac. 738 14

Seattle & M. R. Co. vs. Roeder, 30 Wash. 244, 70 Pac. 498 14

Seattle & Montana Railway Company vs. State of Washington, 7 Wash. 150, 34 Pac. 551..... 6

State ex rel. Oregon-Washington Water Service Co. vs. Hoquiam, 155 Wash. 678, 286 Pac. 286, 287 Pac. 670..... 23

State ex rel. Peabody vs. Superior Court, 77 Wash. 593, 138 Pac. 277.....5, 18, 19

State ex rel. Portland & Seattle Railway Compnay vs. Superior Court, 45 Wash. 270, 88 Pac. 201 6

State ex rel. Puget Sound & W. H. Ry. Co. vs. Foster, 84 Wash. 75, 146 P. 154, 155..... 24

State ex rel. Washington Water Power Company vs. Superior Court, 8 Wash. (2d) 122, 111 Pac. (2d) 577 .....5, 17

State ex rel. Weyerhaeuser Timber Company vs. Superior Court, 71 Wash. 84, 127 Pac. 591..... 5

State of Washington vs. Superior Court, 128 Wash. 79, 222 Pac. 208..... 6

Sultan W. and P. Co. vs. Weyerhaeuser Timber Co., 31 Wash. Wash. 558, 72 Pac. 114..... 14

Tacoma vs. Nisqually Power Company, 57 Wash. 420, 107 Pac. 199..... 4

Uhden Inc. vs. Greenough, 181 Wash. 412, 43 Pac. (2d) 983 7

U. S. vs. Johnson, 268 U. S. 220, 69 Law Ed. 925.... 10

United States vs. United States Fidelity & Guaranty Co., 236 U. S. 512, 59 Law Ed. 696..... 11

Weber vs. West Seattle Land & Improvement Co., 188 Wash. 512, 63 Pac. (2d) 418..... 12

PAGE

Westinghouse Air Brake Co. vs. City of Pittsburgh, 176 Atl. 13 13

Wicklund vs. Allraum, 122 Wash. 546, 211 Pac. 760 12

Wise vs. Mills, 220 U. S. 549, 55 Law Ed. 579 11

Wood vs. Seattle, 23 Wash. 1, 60 Pac. 135 7

CONSTITUTIONS

Article XII, Sec. 22, Washington State Constitution 7

Article 1, Sec. 16, Washington State Constitution.. 18

STATUTES

Judicial Code, Section 240 (a), as amended by Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C. A., Sec. 347) 1

Rem. Rev. Stat. of Wash., Sec. 9276 6

Rem. Rev. Stat. of Wash., Sec. 11605 et seq. 2

Rem. Rev. Stat. of Wash., Sec. 11610 (b) 4

COURT RULES

Rule 51, Rules of Civil Procedure 11

Rule 38(5)(b), Supreme Court Rules 3, 9

TEXTS, ETC.

20 A. J., 751, Sec. 893 13

20 A. J., Secs. 457, 558, 585, pp. 404, 470, 491 19

Lewis on Eminent Domain, Sec. 756 18

22 C. J., 586, Sec. 685 13

Orgel on Eminent Domain, Sec. 221, p. 475 16

Simkins, Federal Practice (3d Ed.), Sec. 919 10

Wigmore on Evidence (2d Ed.), Sec. 581, pp. 580-581 19

Wigmore on Evidence, Vol. 1 (2nd Ed.), Sec. 716, p. 1134, and Sec. 714, p. 1130 13

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Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Ninth Circuit, is reported at 123 Federal (2d) 286.

Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code, Section 240 (a), as amended by Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Statement of the Case

Like petitioners, we will call the petitioners "the Company" and the respondent "the District."

The District is a municipal corporation organized under Rem. Rev. Stat. of Washington, Sec. 11605 *et seq.*, with boundaries coextensive with Whatcom County, Washington, and with authority to construct and acquire, either by purchase or condemnation, and to operate plants or systems for the furnishing of electrical and water service.

The District instituted this proceeding to acquire by condemnation the electrical generating, transmission and distribution properties of the Company in Whatcom County, and two transmission lines extending therefrom and connecting with substations of the Company in adjoining Skegit County (R. 11).

The cause first came before the Trial Court for hearing on Public Use and Necessity. A Decree was duly entered (R. 110).

Thereafter the cause came on for trial before the District Judge, sitting with a jury, for the purpose of fixing the just compensation to be paid to the Company (1) for the property taken (market value), and (2) for damages, if any, to the property not taken caused by the taking (severance damages.) The trial lasted thirteen weeks; 9,700 pages of testimony was taken and 385 exhibits introduced.

The district's lowest combination of estimates for market value and severance damages at the trial was $2,935,700, its highest $3,023,000; the Company's lowest combination $6,750,000, its highest $7,442,000.

The jury's verdict was $5,000,000, or $1,977,000 higher than the District's highest combination and $1,750,000 lower than the Company's lowest combination, and consequently well within the range of testimony.

Judgment on the verdict was entered August 24, 1940 (R. 159).

The Company appealed from both the decree and the judgment (R. 163.) On October 24, 1941, both were affirmed (R. 1832, 1877).

Questions Presented and Assignments of Error

The Company's statement of questions presented (in its Petition) and its assignments of error (in its Brief) are argumentatively stated and phrased. We will endeavor to make the necessary clarifications below.

The real question here is whether review should be granted under Supreme Court Rule 38 (5) (b). The Company fails to even mention this rule and is not specific as to the provision or provisions thereof upon which it relies. From its "Conclusion" (page 31 of its Brief), however, we infer that it claims that, as to the four points which it raises, the decision of the

Circuit Court of Appeals is either "in conflict with the decision of another Circuit Court of Appeals on the same matter," or that the Circuit Court of Appeals "has decided an important question of local law in a way probably in conflict with applicable local decisions."

Examination of the points and cases involved discloses that no such conflict exists, and that the questions raised are not important and involve mostly mere questions of fact which were found adversely to the Company by both courts below.

Argument

(1) Public Use and Necessity

The District is specifically authorized by Washington statute to either construct new properties or acquire existing properties.

> Rem. Rev. Stat. of Wash., Sec. 11610(b).
>
> *Carstens vs. Public Utility District No. 1 of Lincoln County*, 8 Wash. (2d) 136, 111 Pac. (2d) 583.

It has here elected to acquire the Company's existing properties (R. 11).

The finding of its Commissioners as to the necessity for this is binding upon the courts in the absence of arbitrary, capricious or fraudulent action.

> *Tacoma vs. Nisqually Power Company*, 57 Wash. 420, 107 Pac. 199.

State ex rel. Peabody vs. Superior Court, 77 Wash. 593, 138 Pac. 277.

State ex rel, Washington Water Power Company vs. Superior Court, 8 Wash. (2d) 122, 111 Pac. (2d) 577, 582.

Carstens vs. Public Utility District No. 1 of Lincoln County, 8 Wash. (2d) 136, 111 Pac. (2d) 583.

There is no evidence of any such action here. Petitioner's own witness Gillette testified (R 406) that he would not recommend duplication if existing facilities could be acquired.

The Company fails to mention the two recent cases last above cited, which involved the entry of decrees of public use and necessity in condemnation proceedings instituted by public utility districts similar to the District here, and in which parts of a large electric system were being acquired by such districts. As to portions of these properties located outside of the districts and also as to certain non-exclusive franchises proposed to be acquired, the contention was raised that there was no "public necessity." This was rejected by the court in each case.

The Circuit Court of Appeals cites and follows these cases in its decision (R. 1838).

The rule in Washington is that of "reasonable necessity" and not of necessity in the sense of indispensability.

State ex rel. Weyerhaeuser Timber Company

vs. Superior Court, 71 Wash. 84, 127 Pac. 591.

The case of *Seattle & Montana Railway Company vs. State of Washington*, 7 Wash. 150, 34 Pac. 551, cited by the Company on page 17 of its Brief, was determined upon the special provisions of a statute relating to the condemnation of properties by railway companies, which statute has no application here.

The cases of *State ex rel. Portland & Seattle Railway Company vs. Superior Court*, 45 Wash. 270, 88 Pac. 201, and *State of Washington vs. Superior Court*, 128 Wash. 79, 222 Pac. 208, cited by the Company on the same page of its Brief, are based upon statutes which have requirements different than Rem. Rev. Stat. of Wash., Section 9276, applicable here.

See decision Circuit Court of Appeals (R. 1837).)

In each of the above cases great damage to the condemnee could be avoided by slight change in the plans.

Here the Company will suffer no great damage, and none not fully compensated for in the verdict.

The Company's statement that the District's only purpose in acquiring existing properties, rather than constructing competing ones, is to establish a monopoly, is merely its own conclusion drawn from the fact that the District is acquiring such properties rather than constructing others.

Article XII, Section 22, of the Washington State Constitution, prohibiting monopolies and cited by the Company on page 18 of its Brief, has no application here because that section applies only to private monopilies.

Uhden, Inc., vs. Greenough, 181 Wash. 412, 43 Pac. (2d) 983.

Griffiths vs. Robinson, 181 Wash. 438, 43 Pac. (2d) 977.

Wood vs. Seattle, 23 Wash. 1, 60 Pac. 135.

The decision of the Circuit Court of Appeals is not in conflict with the decision of any other Circuit Court of Appeals. The Company cites none.

The Company's argument (on pages 18 and 19 of its Brief) as to the claimed advantages of what it calls its "integrated electric system" as compared to the system which the District would establish involves a question that is political in nature rather than legal.

(2) Instruction on Assumed Use of General Contractor in Estimated Cost of Reproduction New of Properties

The trial court did not instruct the jury "to eliminate contractor's profit," as indicated by the Company at page 19 of its Brief. The trial court instructed the jury that contractor's profit might be considered.

In utility valuation proceedings Reproduction Cost New Estimates, based on assumed present conditions and present prices of materials and labor, are per-

mitted on the theory that they will assist in the determination of present value.

In order that they may do this, rather than perhaps confuse or mislead, the underlying concept must be kept clear and consistent.

Generally in such estimates, as here, non-competitive prices for materials and labor, based on mere quotations and catalogue price listings and labor scales, are used, and generous overheads of all kinds added.

Generally construction by the owner is assumed.

Here the Company's witness Veatch assumed construction through a general contractor (R. 1147).

This the Trial Court approved, but cautioned (though the challenged instruction) that the contractor's profit and contractor's performance bond (here 10¾ per cent of previous items in the estimate) should not merely be added to other costs therein (R. 1762, 1763).

This instruction was based upon the testimony of Veatch himself to the effect that the only excuse for introducing a general contractor into such an estimate would be that by so doing a sufficient saving would be made to justify his introduction—that he would have to pay his way (R. 1319).

See opinion Circuit Court of Appeals (R. 1844).

The case of *Cary vs. Corporation Commission of Oklahoma*, 17 Fed. Supp. 772, and *Brooklyn Borough*

Gas Co. vs. Prendergast, 16 Fed. (2d) 615, cited by the Company at page 22 of its Brief, merely hold that it is proper to consider construction through a contractor in such an estimate. In both cases it is stated that such a contractor should pay his own way by savings in other costs. Such holdings are in no way in conflict with the instruction by the Trial Court, but are in harmony therewith. Furthermore, both of these cases are three-judge district court decisions and do not constitute a "decision of another Circuit Court of Appeals" within the meaning of Supreme Court Rule 38(5)(b).

Even if such decisions were so considered, and if they were in conflict with the holding in this case (which they are not), they would not be ground for review, because no federal question is involved.

> *Ruhlin vs. N. Y. Life Ins. Co.*, 304 U. S. 202, 82 L. Ed. 1290.

The Company cites no decision of the Washington Supreme Court.

The attempted review is thus not based upon any difference in decisions between Circuit Courts of Appeals or with any local court, but rather upon the weighing and construction of the testimony given by the Company witness Veatch. What the Company is really asking this Court to do is re-examine that testimony.

The Company contends that use of the phrase "savings * * * on material and labor costs" in the instruction operated to exclude savings in other costs. However, the record shows that at the trial this phrase was used by all parties concerned as including all costs. Veatch himself divided "the total construction" into 60 per cent "material" and 40 per cent "labor" (R. 1302.) This interpretation was adopted by counsel for the Company and used by him in the taking of his fourth exception to the instruction (R. 1789-1790).

The Court will not grant certiorari to review evidence and decide disputed facts.

U. S. vs. Johnson, 268 U. S. 220, 227, 69 Law Ed. 925-926.

Houston Oil Co. vs. Goodrich, 245 U. S. 440, 62 Law Ed. 385.

Layne & Bowler Corp. vs. Western Well Works, 261 U. S. 387, 67 Law Ed. 712.

Simkins, Federal Practice (3d Ed.), Sec. 919.

This is especially true where, as in this case, both courts below found the facts the same way.

Page vs. Arkansas Natural Gas Corporation, 286 U. S. 269, 271, 76 Law Ed. 1096, 1098.

Simkins, Federal Practice (3d Ed.), Sec. 919.

An independent reason why review of this point should not be granted is that the Circuit Court of Appeals based its decision upon the alternative ground that in taking its exception to the instruction before

the Trial Court the Company did not specify the grounds for the exception which it now urges, and is barred from now asserting the same under Rule 51, Rules of Civil Procedure.

See Circuit Court of Appeals opinion (R. 1845).

This holding of the Circuit Court of Appeals as to the effect of failure to comply with Rule 51 is in harmony with the uniform holdings of this Court and of the Circuit Courts of Appeals.

United States vs. United States Fidelity & Guaranty Co., 236 U. S. 512, 59 Law Ed. 696.

New York Life Insurance Co. vs. Melgard, (C. C. A. 7 1935), 74 Fed. (2d) 489.

N. P. Railway Co. vs. Krohne (C. C. A. 9), 86 Fed. 230.

This Court will not grant certiorari where the decision sought to be reviewed has been based in the alternative upon grounds other than that upon which review is sought.

Wise vs. Mills, 220 U. S. 549, 55 Law Ed. 579.

Furthermore, the question presented has no importance beyond the present case.

(3) Striking Certain Opinion Testimony of Witnesses MacFadden and Scudder on Severance Damages to Company's Bellingham Office Building

The rulings under this heading went to the manner and order of proof, rather than to the right to prove.

They dealt with the qualification of witnesses to give opinion evidence.

Here in each instance the witness concerned disqualified himself by his own testimony. (Opinion Circuit Court of Appeals, R. 1839-1842).

(a) Testimony of MacFadden

The witness MacFadden testified that he based his opinion on the reports of others not yet produced, that he accepted these reports wholly, and that he had no personal knowledge of real estate values in Bellingham (R. 1459, 1463-1464.) If the record is consulted it will be noted that at the time the Trial Court sustained the motion to strike Mr. MacFadden's opinion, it indicated that it would receive this opinion after the Company had offered the testimony of the witnesses upon which Mr. MacFadden based his opinion (R. 1465-1466.) This testimony was never produced.

The presumption under Washington law that an owner is qualified to testify on market value does not persist in the face of a disclaimer such as was made here.

The case of *Weber vs. West Seattle Land & Improvement Co.*, 188 Wash. 512, 63 Pac. (2d) 418; Wicklund *vs. Allraum*, 122 Wash. 546, 211 Pac. 760, and *Alaska-Juneau Gold Mining Co. vs. Larson* (C.C.A. 9), 279 Fed. 420, cited by the Company on page 24 of its

Brief, concern personal rather than real property. They are based upon the presumption that an owner is familiar therewith and with the purchase and sale of similar properties so as to qualify him as one having special knowledge with reference thereto. Ordinarily the valuation of real property requires special valuation experience.

Port Townsend Southern Railway Co. vs. Nolan, 48 Wash. 382, 93 Pac. 528.

Wigmore on Evidence, Vol. 1, 2nd Ed. (Contrast, Sec. 716, p. 1134, with Sec. 714, p. 1130).

22 C. J. 586, Sec. 685.

The cases cited by the Company do not hold that the presumption of qualification holds or that it persists, especially in the case of a corporate representative, in the face of a disclaimer of such knowledge and experience.

Company A, 1st Reg. vs. Hughes (N. D. 1923), 193 N. W. 144.

McClure vs. Browns Valley (Minn. 1919), 173 N. W. 672.

Westinghouse Air Brake Co. vs. Pittsburgh (Pa. 1934), 176 Atl. 13.

20 A. J. 751, Sec. 893.

(b) Testimony of Scudder

The measure of severance damages is the depreciation in the market value of property not taken. This is the difference between such value before and after the taking.

Puget Sound Power & Light Co. vs. City of Puyallup, 51 Fed. (2d) 688 (cited at page 23 of Petitioners' Brief).

City of Seattle vs. Lake Union Brick Co., 166 Wash. 278, 6 Pac. (2d) 591.

Sultan W. & P. Co. vs. Weyerhaeuser Timber Co., 31 Wash. 558, 72 Pac. 114.

Seattle and M. R. Co. vs. Roeder, 30 Wash. 244, 70 Pac. 498.

The witness Scudder did not use or apply this measure. He determined severance damages on an entirely different basis, and without any reference to market value whatsoever, either before or after the taking.

His testimony on cross-examination prior to the motion to strike disclosed that he was not using the concept of market value as "the price that would be agreed upon between a willing buyer and a willing seller, neither acting under compulsion" (R. 1625).

The cases of *Seattle & M. Ry. Co. vs. Gichrist*, 4 Wash. 509, 30 Pac. 738; *Ingram vs. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34, and *King County vs. Joyce*, 96 Wash. 520, 165 Pac. 399, cited by the Company at page 26 of its Brief, hold that a witness in testifying as to severance damages may express his conclusion in terms of the amount of the damages, and that he need not leave the mathematical calculation of subtracting "market value after the taking" from "market value before the taking" as a function to be

performed exclusively by the jury. These cases have no application here. They merely go to the form of testimony and do not hold that a witness may determine severance damages wholly without reference to market value before and market value after the taking, nor that he need not give these values when asked for them.

The Trial Court sustained the motion to strike Mr. Scudder's testimony because on cross examination it developed that the witness, having given what was supposed to be his mathematical calculation, had in fact made no such calculation at all. He had not considered the market value of the property either before or after the taking. The figure given by him was not a difference in market value but, as stated by both courts below, something entirely different (R. 1625, 1841).

The record discloses that Mr. Scudder made no attempt to arrive at the price which a willing buyer and a willing seller, neither acting under compulsion, woud agree upon for such building before and after the taking. Instead he arrived at his estimate of severance damages solely by taking the use value of the Company's then occupancy of the building (based upon the assumption that the Company was willing to pay therefor a far greater sum than anyone else) and deducting therefrom what he concluded

would be the rental value thereof as between the owner and a renter after the taking, and capitalizing this assumed difference of $6,480.00 "rent" at 6 per cent. Wholly apart from the vice of capitalization at an assumed interest rate, which is an improper basis for valuation (Orgel on Eminent Domain, Sec. 221, page 475), the computation did not determine the amount which a willing buyer and a willing seller would agree upon.

The questions presented under this heading involve merely the interpretation placed on the testimony of these two witnesses by the Trial Court and a majority of the Circuit Court of Appeals, and call only for the analysis and weighing of such testimony.

These questions have no importance beyond the present case.

(4) Admission in Evidence of the District's Resolution No. 37 Declaring Its Willingness to and Intention of Purchasing Power Wholesale From the Company

This resolution was admitted as bearing on a claimed lessening in the market value (i. e. severance damages) of the Company's remaining properties (its generating and transmission properties outside of Whatcom County) caused by the taking.

The Company claimed that the market value of these remaining properties would be lessened because the Company would no longer be able to dispose of the power which it sold through the facilities in What-

com County, that idle generation and transmission capacity would thus be created, and that it would thus have less use for and be less able to earn on these remaining properties.

Obviously if the Company continued to sell power wholesale to the District it would have the same use for its remaining generating and transmitting facilities after the taking as it had before, and could earn as much thereon. The probability or lack of probability of the District's buying power wholesale from the Company after the taking was thus a proper question for the jury.

> *Puget Sound Power & Light Co. vs. City of Puyallup* (9 C. C. A.), 51 Fed. (2d) 688.
>
> *State ex rel. Washington Water Power Company vs. Superior Court*, 8 Wash. (2d) 122, 111 Pac. (2d) 577.

This is admitted for the purpose of the Company's petition for review here at page 27 of its Brief, but was not so admitted by it in the Courts below.

Certainly a willing buyer and a willing seller dealing with these remaining properties for the purpose of arriving at a price therefor would consider the probability of such purchase, and the attitude of the District with reference thereto. Certainly the market value of such remaining properties with such a prospective power purchaser might be one thing and without such prospective purchaseer another.

The Company's witnesses testified that in their opinion the District did not intend to purchase power wholesale from the Company (R. 1366, 1390-1391).

The District Commissioners adopted Resolution No. 37 declaring the "intention, willingness and desire" of the District to purchase power wholesale from the Company (R. 1743-1744.) The Company's witnesses Sands (R. 1750) and Gilman (R. 1748) on severance damages knew of and considered this resolution. This resolution was admitted as bearing on the question of intention (R. 1713).

No exception to the admission of this resolution was taken by the Company on the ground now urged; that is, that it constituted an effort to make compensation other than in money in violation of Article I, Sec. 16, of the Washington State Constitution. (For exceptions see Record 1741-1742.) Consequently, under the rule and authorities above cited the point is not now properly before this Court. It will be noted that it is not discussed in the opinion of the Circuit Court of Appeals, of which review is here sought.

Lewis on Eminent Domain, Sec. 756, cited by the company at page 29 of its Brief, merely announces the general doctrine that compensation must be made in money.

The cases of *State ex rel. Peabody vs. Superior Court*, 77 Wash. 593, 613, 138 Pac. 277; *In re. Seattle*, 102 Wash. 286, 288, 172 Pac. 1161; *Blomskog*,

Erickson & Cotton vs. Seattle, 107 Wash. 471, 473, 182 Pac. 571; *Board of Directors of St. Francis Levee District vs. Webb* (C. C. A. 8), 188 Fed. 67, cited by the Company at page 29 of its Brief, are not in conflict with the ruling of the Circuit Court of Appeals. In each of those cases the question involved was not one of intent, but an attempt to actually compensate the owner with an agreement or rights which he might not want, and which would constitute making compensation other than in money. In the present case no attempt was made to convey any right to the Company or to bind the District to take any power from the Company. The showing was merely that the District was willing to and intended to buy power from the Company, and this evidence was pertinent as bearing upon the probability of its doing so. It is well settled that evidence of intent offered by a party to an action is admissible if relevant.

Wigmore on Evidence, (2d Ed.), Sec. 581, pp. 580-581.

Mutual Life Ins. Company vs. Hillman, 145 U. S. 285, 36 L. Ed. 706.

20 A. J., Secs. 457, 558, 585, pp. 404, 470, 491.

In *State ex rel. Peabody vs. Superior Court*, 77 Wash. 593, 138 Pac. 277, *supra*, the City of Seattle in condemning certain portions of a railway system offered to grant to the condemnee common user rights over the portion of the tracks taken at a rental to be determined under procedure specified by the Seattle

City Charter. The Washington Supreme Court properly held that the amount of compensation for the property taken "cannot be lessened by a tender of something the railway may not want, and which it must pay for if accepted" (ibid, page 616).

The other two Washington cases cited by petitioners, namely, *In re. Seattle*, 102 Wash. 286, 172 Pac. 1161, and *Blomskog, Erickson & Cotton vs. Seattle*, 107 Wash. 471, 182 Pac. 571, support the admissibility of the resolution in evidence. These cases held that a city seeking to mitigate damages by demonstrating an intent to do certain acts must evidence that intent by some "authoritative official action" and that statements of the city officials are not the best evidence.

In *Board of Directors of St. Francis Levee District vs. Webb* (C. C. A. 8), 188 Fed. 67 *supra*, cited by the Company, a levee district condemned lands for a right-of-way under a plan calling for the construction of a levee, and the condemnee claimed damages for obstruction to drainage which it claimed would result from the proposed plan of construction. The district offered to enter into a stipulation to do such construction work under the future supervision of the court as would eliminate the obstruction, and requested, in return therefor, an instruction to the effect that by reason of such stipulation no severance damages would result. The court points out that the

district had not established that the construction provided for in the stipulation would eliminate the obstruction to dainage, and that the condemnee was entitled to payment in money.

(5) Divided Court and Importance of Questions

The Company points out that the Court below was divided, and that a concurring opinion and a dissenting opinion were filed. Judge Garrecht concurred with Judge Haney, but added a ground for affirmance of the striking of the testimony of the witnesses MacFadden and Scudder (R. 1851-1854.) Judge Stephens dissented on two points only, those referring to the contractor's profit instruction and the striking of the testimony of Messrs. MacFadden and Scudder. In each instance Judge Stephens' opinion was based upon his own analysis and construction of the testimony involved, and his construction was different than that of the Trial Court and Judges Haney and Garrecht. What the Company really asks this Court to do upon these points is to re-examine this testimony and re-determine these facts contrary to the findings of the two courts below.

The Company asserts that the law established in this proceeding is of great importance because there are a large number of public utility districts inovlved in similar proceedings in Washington. This contention is without foundation. The points raised upon which there was a difference of opinion in the Court

below are based wholly upon the interpretation of the evidence and not upon any difference of opinion as to applicable law to facts once determined. All the Court would accomplish by review of the points involved would be a re-examination of the facts as applied to this particular proceeding.

Insofar as the question of public necessity is concerned, the Company cites no instance where this or any other Court has ever held that an election to acquire existing properties rather than to construct competing properties, where authority to do either is granted to a municipal corporation, is arbitrary or capricious. In fact a far better claim could be made out to the effect that it would be arbitrary and capricious to construct a competing system than it would be to acquire existing properties, as extensive damage might thus be done to the owner of the existing properties for which he would have no right to compensation. Where acquisition of existing properties is had, such properties can be taken only after determination and payment of just compensation covering both the market value of the properties taken and the severance damages to any remaining properties not taken caused by the taking.

As to the fourth question, namely, the propriety of the District showing its willingness and intention to purchase power from the Company, the Company itself offered evidence which it claimed established

a lack of such intention and willingness, but urges here that it was improper for the District to offer evidence on this same point.

Conclusion

The division of the Court below was on two of the four questions presented here, and in each instance this division was upon interpretation of evidence only.

The company asserts that the questions presented are important. It may well be that the moving cause for this conclusion on its part lies in

> *State ex rel. Oregon-Washington Water Service Co. vs. Hoquiam*, 155 Wash. 678, 286 Pac. 286, 287 Pac. 670.

pursuant to which it expects during this appeal to retain the earnings from its properties and, at the same time, receive interest at 6 per cent per annum ($822 per day) on the verdict, thus in effect securing double earnings during each day's delay.

The decision of the Court below is not in conflict with the decision of any other Circuit Court of Appeals on any of the points involved or with any decision of the Washington Supreme Court on applicable local law.

The following statement of the Circuit Court below is entitled to notice with reference to the point

before us and the Brief of petitioners taken as a whole:

> "With respect to objections to instructions, the following from *State ex rel, Puget Sound & W. H. Ry. Co. v. Foster*, 84 Wash. 75, 146 P. 154, 155, is pertinent: '* * * * It might be possible to discover technical errors in these rulings of the court were we to notice some few expressions therein without reference to the instruction as a whole: but that the learned trial court plainly conveyed to the jury the thought that the ultimate measure of respondents' damages must be the depreciation in the market value of the remaining portion of their farm in addition to the value of the portions taken seems so plain to us that whatever technical error there may have been in some few expressions of the court, standing alone, it was wholly without prejudice. * * *'" (ibid, pp. 293-294).

It is respectfully submitted that the petition for writ of certiorari should be denied.

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